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Attorney for Defendant, ISRAEL MORALES-AMARO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ISRAEL MORALES-AMARO,
PABLO GUZMAN-ZACARIAS,

Defendants.

)
) Case No. 08CR0641-JLS
)

) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT OF
) MOTION TO COMPEL DISCOVERY
)

) DATE: 4/11/08

) TIME: 1:30 p.m.
)

I.

STATEMENT OF FACTS

Defendant, MORALES-AMARO, has been indicted on six counts of transportation of illegal aliens and bringing aliens to the United States for the purpose of financial gain in violation of 8 U.S.C. §1324.

On February 19, 2008 at approximately 8:15 p.m., Border Patrol Agents received a citizen's report of a white van stopped at the side of the road near Airport Mesa, close to Jacumba, with suspected illegal aliens loading into it. This location is approximately one-half mile north of Mexico and 25 miles east of the Tecate, California Port of Entry. The white van was located by agents, subsequently observed to be what agents felt to be heavily laden in the

1 rear, and the van was followed on Interstate 8 as it drove down the Inkopah Grade towards
2 Imperial County. At the bottom of the Grade, the van pulled to the side of the road and agents
3 then activated their overhead emergency lights. They found 22 people in the van, but no one
4 in the driver's seat.
5

6 Observations of the agents and information subsequently obtained from the Co-
7 Defendant and smuggled aliens, led the agents to arrest Defendant Morales on the belief that
8 he was driver of the van. Subsequent to Miranda advisement, Defendant Morales allegedly
9 made various self-incriminatory statements.
10

11 Defendant Morales believed he had reached a Plea Bargain with the United States
12 Attorney's Office on this case and was prepared to plead guilty. He was prevented from doing
13 so by the United States Attorney's Office "Package Disposition Policy".
14

15 II.

16 MOTION TO COMPEL DISCOVERY

17
18 Defendant moves for discovery that is not limited to those items that the prosecutor
19 knows of, but rather includes all discovery listed below that is in custody, control, care, or
20 knowledge of any "closely related investigative (or other) agencies" under the United States v.
21 Bryan, 868 F.2d 1032 (9th Cir.), cert. denied, 493 U.S. 858 (1989):
22

23 (1) The Defendant's Statements. Under Fed. R. Crim. P. 16 (a) (1) (A) the
24 defendant is entitled to disclosure of all copies of any written or recorded statements made by
25 the defendant; the substance of any statements made by the defendant which the government
26 intends to offer in evidence at trial; any recorded testimony of the defendant before the grand
27 jury; any response by the defendant to interrogation; the substance of any oral statements
28

1 which the government intends to introduce at trial; and any written summaries of the
2 defendant's oral statements contained in the handwritten notes of the government agents; any
3 response to any Miranda warnings which may have been given to the defendant (see United
4 States v. McElroy, 697 F.2d 459 (2d Cir. 1982)); and any other statements by the defendant
5 that are discoverable under Fed. R. Crim. P. 16(a)(1)(A). This includes but is not limited to
6 statements made during the execution of the search warrants herein. The Advisory Committee
7 Notes as well as the 1991 amendments to Rule 16 make it clear that the Government must
8 reveal all the defendant's statements, whether oral or written regardless of whether the
9 Government intends to introduce those statements;

12 (2) **Arrest Reports, Notes and Dispatch Tapes.** The defendant also specifically
13 requests that all arrest reports, notes and dispatch or any other tapes that relate to the
14 circumstances surrounding his arrest, the searches, or any questioning, if such reports have not
15 already been produced in their entirety, be turned over to him. This request includes, but is
16 not limited to, any rough notes, records, reports, transcripts or other documents in which
17 statements of the defendant or any other discoverable material is contained. This is all
18 discoverable under Fed. R. Crim. P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83 (1963).
19 See also United States v. Johnson, 525 F.2d 999 (2d Cir. 1975), cert. denied, 424 U.S. 920
20 (1976); United States v. Lewis, 511 F. 2d 798 (D.C. Cir. 1975); United States v. Pilnick, 267
21 F. Supp. 791 (S.D.N.Y. 1967); Loux v. United States, 389 F.2d 911 (9th Cir.), cert. denied,
22 393 U.S. 867 (1968). Arrest reports, investigator's notes, memos from arresting officers,
23 dispatch tapes, sworn statements, and prosecution reports pertaining to the defendant are
24 available under Fed. R. Crim. P. 16(a)(1)(B) and (C), Fed. R. Crim. P. 26.2 and 12(I);
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26
27
28

1 **(3) Reports of Scientific Tests or Examinations.** Pursuant to Fed. R. Crim. P.
 2 16(D), defendant requests the reports of all tests and examinations conducted upon the
 3 evidence in this case, including but not limited to, the scientific chemical testing done upon
 4 any drugs seized in this case to determine if it was indeed an illegal substance, and any
 5 fingerprint testing done upon any evidence seized in this case, that it within the possession,
 6 custody, or control of the government, the existence of which is known, or by the exercise of
 7 due diligence may become known, to the attorney for the government, and which are material
 8 to the preparation of the defense or are intended for use by the government as evidence in
 9 chief at the trial;
 10

11 **(4) Brady Material.** The defendant requests all documents, statements, agent's
 12 reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which
 13 affects the credibility of the government's case. Impeachment as well as exculpatory evidence
 14 falls within Brady's definition of evidence favorable to the accused. United States v. Bagley,
 15 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976);
 16

17 **5. Any Information that May Result in a Lower Sentence under the United**
 18 **States Sentencing Guidelines (U.S.S.G.).** As discussed above, this information is
 19 discoverable under Brady v. Maryland, 373 U.S. 83 (1963). This request includes any
 20 cooperation or attempted cooperation by the defendant, as well as any information that could
 21 affect any base offense level or specific offense characteristic under Chapter Two of the
 22 U.S.S.G. Also included in this request is any information relevant to a Chapter Three
 23 adjustment, a determination of the defendant's criminal history, or any other application of
 24 U.S.S.G.;
 25
 26
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1 **(6) The Defendant's Prior Record.** Evidence of prior record is available under
 2 Fed. R. Crim. P. 16(a)(1)(B);

3 **(7) Any Proposed 404 (b) Evidence.** Evidence of prior similar acts is discoverable
 4 under Fed. R. Crim. P. 16(a)(1)(C) and Fed. R. Evid. 404(b) and 609. In addition, under Fed.
 5 R. Evid. 404 (b), "upon request of the accused, the prosecution...shall provide reasonable
 6 notice in advance of trial...of the general nature..." of any evidence the government proposes
 7 to introduce under Fed. R. Evid. 404(b) at trial. The defendant requests that such notice be
 8 given three weeks before trial in order to give the defense time to adequately investigate and
 9 prepare for trial;
 10

11 **(8) Evidence Seized.** Evidence seized as a result of any search, either warrantless
 12 or with a warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)(C).
 13

14 **(9) Request for Preservation of Evidence.** The defendant specifically requests
 15 that all dispatch tapes or any other physical evidence that may be destroyed, lost, or otherwise
 16 put out of the possession, custody, or care of the government and which relate to the arrest or
 17 the events leading to the arrest in this case be preserved. This request includes, but is not
 18 limited to, any samples used to run any scientific tests, any narcotics or other drugs, and any
 19 evidence seized from any third party. It is requested that the government be ordered to
 20 question all the agencies and individuals involved in the prosecution and investigation of this
 21 case to determine if such evidence exists, and if it does exist, to inform those parties to
 22 preserve any such evidence;
 23

24 **(10) Tangible Objects.** The defense requests, under Fed. R Crim. P. 16(a)(2)(C),
 25 the opportunity to inspect and copy as well as test, if necessary, all other documents and
 26 tangible objects, including photographs, books, papers, documents, photographs, of building
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1 or places or copies of portions thereof which are material to the defense or intended for use in
 2 the government's case-in-chief, or were obtained from or belong to the defendant;

3 (11) **Evidence of Bias or Motive to Lie.** The defendant requests any evidence that
 4 any prospective government witness is biased or prejudiced against the defendant, or has a
 5 motive to falsify or distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987);
 6 United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989);
 7

8 (12) **Impeachment Evidence.** The defendant requests any evidence that any
 9 prospective government witness has engaged in any criminal act, whether or not resulting in a
 10 conviction, and whether any witness has made a statement favorable to the defendant. See,
 11 Fed. R. Evid. 608, 609, and 613. Such evidence is discoverable under Brady v. Maryland, 373
 12 U.S. 83 (1963). See United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988) (witness' prior
 13 record); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965) (evidence that detracts from
 14 witnesses' credibility). This includes criminal records of co-defendants and co-conspirators,
 15 whether indicted or not, U.S. v. Curry, 278 F. Supp. 508 (N.D.III, 1967);
 16

17 (13) **Evidence of Criminal Investigation of Any Government Witness.** The
 18 defendant requests any evidence that any prospective witness is under investigation by federal,
 19 state or local authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d
 20 Cir.), cert. denied, 474 U.S. 945 (1985);
 21

22 (14) **Evidence Affecting Perception, Recollection, Ability to Communicate, or**
 23 **Truth Telling.** The defense requests any evidence, including any medical or psychiatric
 24 report or evaluation, tending to show that any prospective witness' ability to perceive,
 25 remember, communicate, or tell the truth is impaired; and any evidence that a witness has ever
 26 used narcotics or other controlled substance, or has ever been an alcoholic. United States v.
 27
 28

1 Strifler, 851 F.2d 1197 (9th Cir. 1988); Chavis v. North Carolina, 637 F. 2d 213, 224 (4th Cir.
2 1980);

3 (15) **Witness Addresses.** The defendant requests the name and last known address
4 of each prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir.
5 1987); United States v. Tucker, 716 F.2d 576 (9th Cir. 1983); United States v. Cook, 608 F.2d
6 1175, 1181 (9th Cir. 1979) (defense has equal right to talk to witnesses), cert. denied, 444
7 U.S. 1034 (1980). The defendant also requests the name and last known address of every
8 witness to the crime or crimes charged (or any overt acts committed in furtherance thereof)
9 who will not be called as a government witness. United States v. Cadet, 727 F.2d 1453 (9th
10 Cir. 1984);

11 (16) **Name of Witnesses Favorable to the Defendant.** The defendant requests the
12 name of any witness who made an arguably favorable statement concerning the defendant or
13 who could not identify him or who was unsure of his identity, or participation in the crime
14 charged. This request includes but is not limited to statements by witnesses which do not
15 mention this defendant. Jackson v. Wainwright, 390 F.2d 288(5th Cir. 1968); Chavis v. North
16 Carolina, 637 f. 2D 213, 223 (4th Cir. 1980); Jones V. Jago, 575 F.2d 1164, 1168 (6th Cir),
17 cert. denied, 439 U.S. 883 (1978); Hudson v. Blackburn, 601 F. 2d 785 (5th Cir. 1979), cert.
18 denied, 444 U.S. 1086 (1980);

19 (17) **Statements Relevant to the Defense.** The defendant requests disclosure of any
20 statement that may be “relevant to any possible defense or contention” that he might assert.
21 United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982);

22 (18) **Jencks Act Material.** The defense requests all material to which defendant is
23 entitled pursuant to the Jencks Act, 18 U.S.C Section 3500, reasonably in advance of trial,

1 including dispatch tapes. A verbal acknowledgment that “rough” notes constitutes an accurate
2 account of the witnesses’ interview is sufficient for the report or notes to qualify as a
3 statement under Section 3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963).
4 In United States v. Boshell, 952 F. 2d 1101 (9th Cir. 1991), the Ninth Circuit held that when an
5 agent goes over interview notes with the subject of the interview the notes are then subject to
6 the Jencks Act. The defense requests pre-trial production of Jencks material to expedite cross-
7 examination and to avoid lengthy recesses during trial;
8

9
10 (19) **Giglio Information.** Pursuant to Giglio v. United States, 405 U.S. 150 (1972),
11 the defendant requests all statements and/or promises, express or implied, made to any
12 government witnesses, in exchange for their testimony in this case, and all other information
13 which could arguably be used for the impeachment of any government witnesses;
14

15 (20) **Personnel Records of Government Officers Involved in the Investigation,**
16 **Interview, or Analysis.** The defendant requests all citizen complaints and other related
17 internal affairs documents involving any of the law enforcement officers who were involved in
18 the investigation, arrest and interrogation of defendant, pursuant to Pitchess v. Superior Court,
19 11 Cal. 3d 531, 539 (1974). Because of the sensitive nature of these documents, defense
20 counsel will not be able to procure them from any other source;
21

22 (21) **Government Examination of Law Enforcement Personnel Files.** Defendant
23 requests that the government examine the personnel files and any other files within its
24 custody, care or control, or which could be obtained by the government, for all testifying
25 witnesses, including testifying officers. Defendant requests that these files be reviewed by the
26 government attorney for evidence of perjurious conduct or other like dishonestly, or any other
27 material relevant to impeachment, or any information that is exculpatory, pursuant to its duty
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1 under United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). The obligation to examine files
 2 arises by virtue of the defense making a demand for their review: the Ninth Circuit in
 3 Henthorn remanded for in camera review of the agents' files because the government failed to
 4 examine the files of agents who testified at trial. This Court should therefore order the
 5 government to review all such files for all testifying witnesses and turn over any material
 6 relevant to impeachment or that is exculpatory to defendant prior to trial. Defendant
 7 specifically requests that the prosecutor, not law enforcement officers, review the files in this
 8 case. The duty to review the files, under Henthorn, should be the prosecutor's and not the
 9 officers'. Only the prosecutor has the legal knowledge and ethical obligations to fully comply
 10 with this request.

13 (22) **Notice of evidence for Pretrial Motion purposes.** Defendant moves the court
 14 to require the government to give notice of all evidence it intends to use in its case in chief
 15 which may arguably be subject to a pretrial motion to suppress. FRCP 12(d)(2).
 16

17 (23) **Continuing Order.** Defendant moves this Court to Order that all discovery
 18 orders entered be continuing orders to disclose requiring the government to provide Defendant
 19 with all discoverable information as soon as such information becomes available to the
 20 government.
 21

22 Date: March 14, 2008

23 Respectfully submitted,

24
 25 s/Donald A. Nunn
 26 Donald A. Nunn,
 27 Attorney for Defendant ISRAEL MORALES-
 28 AMARO

CERTIFICATE OF SERVICE

I, Donald A. Nunn declare that:

I am, and was at the time of service of the papers herein referred to, over the age of 18 years and not a party to this action; and I am employed in the County of San Diego, California. My business address is 13426 Community Road. Poway, California.

I caused to be served by electronic mail on March 14, 2008:

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO COMPEL DISCOVERY**

to the following:

- **John C Ellis , Jr**
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s/Donald A. Nunn
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